United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2057

To be argued by
FRANK H. SANTORO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2057

GREGORY A. JOHNSON,

Appellant,

—v.—

COMMANDING OFFICER, USS CASIMIR PULASKI (SSBN 633) BLUE CREW UNITED STATES NAVY, GROTON, CONNECTICUT,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Statement of Issues

Did the District Court err in finding a basis in fact for denying Gregory A. Johnson's Petition for Discharge from the United States Navy as a conscientious objector?

Statement of the Case

On November 8, 1974, Gregory Johnson applied for discharge from the Navy as a conscientious objector (A-67). By letter dated June 4, 1975, the Chief of Naval Personnel informed him that his application was denied (A-58). He then filed a Petition for Writ of Habeas Corpus in the District Court for the District of Connecticut seeking discharge on grounds of conscientious

objector status. On November 13, 1975, the District Court issued a restraining order and scheduled a hearing on the petition (A-12). At the hearing on November 21, 1975, the Government moved to remand the case to the Department of the Navy because of the incorrect use of the "beyond a reasonable doubt" standard in the Navy letter of June 4, 1975. The District Court granted the motion and remanded the case for reconsideration, the temporary restraining order remaining in effect. (A-2)

On January 22, 1976, the Chief of Naval Personnel again informed Johnson that his application was disapproved (A-102, A-103). Johnson then filed a Motion for Evidentiary Hearing and was heard by the District Court on February 23, 1976. Exhibits consisting of the administrative record and the statement of reasons for the denial of the request were put in evidence. Johnson testified briefly, and briefs were subsequently filed. (A-2)

On May 14, 1975, the District Court (J. Zampano) denied the petition (A-2). A Notice of Appeal was filed by Johnson. On May 26, 1976, the District Court granted a stay pending appeal for 15 days with leave to file for additional stay with the Court of Appeals (A-2). On June 15, 1976, Johnson's Motion for Stay Pending Appeal was denied by the Court of Appeals.

Statement of the Facts

Gregory Johnson enlisted in the United States Naval Reserve on May 26, 1971 (A-53, A-95-97). On August 5, 1971 he enlisted in the Regular Navy (A-47, A-28, A-29).

In May, 1972 he extended his enlistment in order to enroll in the Nuclear Propulsion Program (A-30, A-87,

A-88). On his application form he stated that "I want to further my education and receive the benefits of the Nuclear Field". (A-89) Except for brief periods of hospitalization and leave, he spent the first three years in the Navy receiving this nuclear training and being exposed to its application. He was respectively assigned to the Naval Training Center at Great Lakes, Illinois, the Naval Nuclear Power School at Bainbridge, Maryland, and the Nuclear Power School Prototype in Schenectady, New York. During this training, on April 9, 1973, Johnson volunteered for submarine duty. (A-35)

In August, 1974, Johnson requested consideration as a conscientious objector, but withdrew his application because of lack of time, parental opposition, and a general feeling that it was better off for all concerned (A-70, A-84). He was then assigned to submarine duty. Shortly after having been assigned to the submarine USS Casimir Pulaski, he filed a discharge request on November 8, 1974 on grounds of conscientious objection. (A-67)

Pursuant to Bureau of Naval Personnel Manual, Article 1860120, he was interviewed by a psychiatrist, a medical officer, two chaplains, and an investigating officer. None of them affirmatively recommended that he be granted a discharge on grounds of conscientious objection (A-62).

On April 3, 1975, an investigating officer conducted a hearing at which Johnson appeared and explained his views (A-61). On April 18, 1975, the investigating officer recommended that Johnson's request for discharge be denied (A-64), and on April 30, 1975, the Commanding Officer of the USS Casimir Pulaski also recommended denial of the discharge request (A-60). After a panel of officers and enlisted personnel had reviewed the request and recommended denial, the Chief of Naval Personnel

further reviewed the matter and denied the request by letter of June 4, 1975. (A-58)

Judicial proceedings were then begun. At the initial hearing on the petition for Writ of Habeas Corpus, the District Court remanded the case for reconsideration in light of the appropriate standard. By letter dated January 22, 1976, the Chief of Naval Personnel again denied the request (A-102, A-103). As Johnson states in his brief, the letter stated:

> "Specifically, it was concluded that you are not sincere in your asserted beliefs of conscientious objection. In addition, it is not clear that you are in opposition to war in any form."

The letter goes on to state that: "This conclusion is based upon a number of factors, including but not limited to the following" at which point the letter goes on to detail certain factual bases for the conclusion. (A-102, A-103).

ARGUMENT

I.

Summary

The criteria for conscientious objection and the "basis in fact" test for review are established law and not disputed by the parties. This case involves essentially an application of the "basis in fact" test. Such test is one of the narrowest known to the law. In applying it, the District Court did not impermissibly "search the record". Moreover, the factors relied on by the District Court in finding such a basis in fact were valid and probative.

II.

The "Basis in Fact" test is one of the Narrowest Known to the Law.

The criteria for qualification as a conscientious objector are well settled in the law and not disputed by the parties in this case. They are stated succinctly in the case of *Smith* v. *Laird*, 486 F.2d 307 (10th Cir. 1973) at 309, 310:

> To qualify for discharge from the armed forces as a conscientious objector, an aplicant must establish that:
>
> 1.) He is opposed to war in any form, *Gillette* v. *United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168 (1971);
>
> 2.) His objection is grounded upon religious principles as enunciated in *Welsh* v. *United States*, 398 US 333, 90 S.Ct. 1792, 26 L.Ed. 2d 308 (1970) and *United States* v. *Seeger*, 380 US 163, 85 S.Ct. 850, 13 L.Ed. 2d 733 (1965); and
>
> 3.) His beliefs are sincerely held, *Witmer* v *United States*, 348 US 375, 75 S.Ct. 392, 99 L.Ed. 428 (1955).
>
> See also *Clay* v. *United States*, 403 US 698, 91 S.Ct. 2068, 29 L.Ed. 2d 810 (1971).

It is also true, that once an applicant has made out a *prima facie* case for classification as a conscientious objector, the Government must show some basis in hard reliable factual evidence to blur the picture painted by the applicant. *Smith* v. *Laird*, *supra* at 310. It is also true, however, that the nature of the factual rebuttal is

dependent upon the nature and strength of the *prima facie* case. This is the basis in fact test. If there is any valid basis in fact for the denial of conscientious objector status, the Court must uphold such denial by an administrative body. It is well settled that this test is the established principle governing scope of review in C.O. cases. *U.S. ex rel. Donham* v. *Resor*, 436 F.2d 751 (2nd Cir. 1971); *Smith* v. *Laird, supra; U.S. ex rel. Robinson* v. *Laird*, 457 F.2d 741 (7th Cir. 1972); *United States ex rel. Foster* v. *Schlesinger*, 520 F.2d 751 (2nd Cir. 1975).

The important point, for purposes of this argument, is that the test is an extremely narrow one. It has been characterized as the "narrowest known to the law". *Singer* v. *Secretary of Air Force*, 385 F. Supp. 1369, 1373 (D. Colo., 1974); *Cole* v. *Clements*, 494 F.2d 141, 141-145 (10th Cir. 1974); *Smith* v. *Laird, supra; Bishop* v. *United States*, 412 F.2d 1064, 1067 (9th Cir. 1969). See also *Nurnberg* v. *Froehlke*, 489 F.2d 843, 846 (2nd Cir. 1973). The basis in fact test found early enunciation in the Supreme Court case of *Estep* v. *United States*, 327 U.S. 114 (1946) which interpreted the Selective Service Law. There Justice Douglas, speaking for the Supreme Court, said:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in confirmity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

This test was reiterated by the Supreme Court in *Dickinson* v. *United States*, 346 U.S. 389 (1953) and again in *Witmer* v. *United States*, *supra*, where Mr. Justice Clark stated:

> "The primary question here is whether, under the facts of this case, the narrow scope of review given this Court permits us to overturn the Selective Service System's refusal to grant petitioner conscientious objector status. It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States*, 346 U.S. 389, 396 (1953). The classification can be overturned only if it has 'no basis in fact.' *Estep* v. *United States*, 327 U.S. 114, 122 (1946)."

See also *United States* v. *Seeger*, *supra*, 163. This narrow test has evolved into one of general applicability to conscientious objector cases and is fully applicable to the case at bar. Its contours are narrow, and its platform is high. The Court cannot weigh the evidence in the traditional sense; a warning bell should go off if this is attempted. It may overturn a decision of the military only if there is no probative evidence at all to support it. The fact that a reviewing Court, on independent analysis of the evidence, might reach a different result is irrelevant. The test is significantly more restrictive than the "substantial evidence" rule which applies in most administrative law situations. The relevant judicial decision, therefore, is not which way the evidence points, but whether or not any valid factual evidence supportive of the decision *exists*.

This narrow test must be kept constantly in mind in analyzing the facts in this and any similar case. It places a very high burden upon the appellant—a burden which he has not met in this case. As the argument below demonstrates, there was enough evidence to substantiate the decision under this test with plenty of room to spare.

Another point may briefly be made on the subject of scope of review. In this case we have review once removed, i.e. review by the Court of Appeals of a decision of a District Court which itself reviewed a decision of the Chief of Naval Personnel. An interesting question arises as to whether or not the scope becomes more narrow as it rises from District to Circuit Court. In cases not involving prior administrative adjudication, the authority is divided on whether the Circuit Court has equal scope as the District Court when the decision is based solely on written materials. *Bowles* v. *Carnegie Illinois Steel Corporation*, 149 F.2d 545, 546 (7th Cir. 1945) indicates that equal scope should be given whereas *Hart* v. *California Pacific Title & Trust Co.*, 136 F.2d 430, 432 (9th Cir. 1943) suggests that an appellate court should not substitute another interpretation for that of the trial court even though it may seem equally tenable. This point does not seem to have been much discussed in the conscientious objector cases. Yet, we do not have a court here being simply asked to find an administrative decision without basis in fact. We have a court being asked to find that a lower court made an error of law when it held that an administrative decision had a basis in fact. Surely, to the extent that the District Court's decision had a factual content, it must be accorded a degree of deference. Even appellant Johnson recognizes this when he points out (on p. 9 of his brief) that "The District Court quite properly rejected an alleged inconsistency as

the objective basis to reject the claim" implying that this matter is now foreclosed from further consideration. While not relying heavily on this point, the Government suggests that the Court of Appeals does not merely step into the shoes of the District Court, but should indeed award some deference to its quasi-factual findings.

Johnson alleges that the Court erred in both a procedural and a substantive sense in denying his application. Each will be taken in turn.

III.

The District Court did not impermissibly search the record to reconstruct reasons for the denial of Gregory Johnson's application.

The main suggestion of error in this appeal is that the District Court conducted an independent search of the record to reconstruct reasons for sustaining the action of the Chief of Naval Personnel. In support of his contention, appellant relies heavily on the case of *United States ex rel. Checkman* v. *Laird*, 469 F.2d 773 (2d Cir. 1972) which does clearly stand for the proposition that such an independent search (or "rummage" as Judge Leventhal put it) cannot be made. When there is a requirement for a statement of reasons by an administrative body, its decision must stand or fall on those reasons and a Court cannot unearth other new ones not relied upon.

This concept demands greater analysis, however, than is subsumed in Johnson's facile assertion that the Court "searched the record". The term is neither a rubric nor an incantation; it is rather, a guide to analysis. The device of judicial search of the record has indeed been

awarded a measure of acceptance in those administrative law situations where a statement of reasons has not been such a strongly felt requirement. *United States* v. *Bryan*, 263 F. Supp. 895, 899 (N.D. Ga. 1967); *Dickenson* v. *United States*, *supra* at 396. The Second Circuit specifically found that a search of the record for factors supporting sincerity *vel non* was permissible in conscientious objector cases in *Rosengart* v. *Laird*, 449 F.2d 523, 529 and footnote 37 (2d Cir. 1971), although Judge Leventhal distinguished *Checkman* from *Rosengart* in that the latter did not allude to the necessity of a statement of reasons. The Administrative Procedure Act provides for an independent review of the record by the Court, 5 U.S.C. 706(2), and this was found to require such a record search in *Braniff Airway, Inc.* v. *C.A.B.*, 379 F.2d 453, 462 (D.C. Cir. 1967) by Judge Leventhal (who, in fact, cited the *Braniff* case for another proposition in *Checkman* at 788 footnote 26). See also *Thompson* v. *United States*, 474 F.2d 323, 326, and footnote 14 (9th Cir. 1973) where the Court was not reluctant to search the record. The concept of record search is thus hardly an inherently pernicious practice; it is rather a device to be used in the rational resolution of the relationship between judicial and administrative bodies.

In his very scholarly and perceptive analysis in *Checkman*, Judge Leventhal has merely refined the doctrine of searching the record where there is a separate and mandated need for a statement of reasons for administrative decisionmaking. The basic principle is one of judicial deference to administrative fact finding as the only method to guard the integrity of the administrative process. When reasons must be stated, this principle of integrity requires that the administrative body be held to those reasons and the Court cannot then search the record to find facts or reasons which were in no evident

way relied on. Seen in this sense, the prohibition against searching the record is actually an aid to the administrative process, a device to make it operate properly.

Applying this more refined concept of searching the record to the instant case, we can see that the Court did not unearth facts unrelied on by the Chief of Naval Personnel. That section of Judge Zampano's decision which has given rise to this question is presumably footnote 2 (A-25) in which the Court states that it "will not close its eyes to the earlier explanation afforded petitioner" as to the strength and conviction of his beliefs as bearing on sincerity. (As a parenthetical matter, it might be remarked that appellant stretches his case when he places heavy reliance on a somewhat casual footnote to a judicial decision; even if it were error, it probably would be harmless). In any event, the Court is not, by this footnote, adverting to new facts unconsidered by the Chief of Naval Personnel in his letter of January 22, 1976. Nor is it adverting to a new theory; the footnote makes clear that the earlier reasons are encompassed within the definition of sincerity. That letter denied Johnson conscientious objector status, in part, on a basis of lack of sincerity which was in turn premised (as it must be) on a wide number of factors including "shallow, poorly formulated, and inconsistent" beliefs and lack of familiarity with fundamental sources of those beliefs. When Judge Zampano adverted to the earlier letter of June 4, he presumably had in mind such excerpts from that letter as "shallow, poorly formulated, and inconsistent" and "virtually no knowledge of the books on author's philosophy" (A-58) and other statements of similar tenor. This can hardly be called rummaging through the record to find new reasons unrelied on by the Chief of Naval Personnel. These, in fact, are the precise reasons relied on in the letter of January 22, 1976. The fact that they were not stated in precisely the same way or even necessarily sub-

sumed under the same rationale or standard is not important. What is important is that they are *facts*, facts which were relied on before and facts which are relied on now. Sincerity is a very elusive and subjective concept, difficult to precisely describe in general and even more difficult to describe in a way which will satisfy everyone's preconceived semantic molds. The Chief of Naval Personnel was simply dipping into the same factual well when he described Johnson on both occasions and Judge Zampano was not "searching the record" when he recognized this.

It is important to remember that the case was remanded because the Chief of Naval Personnel used the wrong standards—not because he used the wrong facts. (It is an interesting, but academic, question as to what differences might exist between the "basis on fact" standard and the "beyond a reasonable doubt" standard). Upon such remand, it would be Alice in Wonderland folly to require that the factual basis for the decision in the first letter could not be used as the basis for the second. The facts, after all, do not change even though the standard might. To suggest somehow (as appellant implicitly does) that the facts relied on in June may not be used in January would be to force the administrative body onto a tautological treadmill, a process of circular reasoning ending in a vacuum.

The fact that the Navy used a somewhat different theory of denial the second time is equally unpersuasive. Sincerity is a concept which can be adduced by a wide variety of factors some of which can also be adduced in support of a contention that a person does not hold his views with the strength and conviction of a religion. The two concepts are not as artificial and separable as Johnson suggests; there is a degree of overlap. The Navy, moreover, is not held, under *Checkman*, to the highest

standards of verbal perfection. What suffices under one theory may well suffice under another and the fact that there may be some surplus administrative or judicial reliance on one does not defeat the independent validity of the other.

IV.

There was a basis in fact for a finding of insincerity.

The remainder of appellant's argument is devoted to substantive allegations that there was insufficient basis for a finding of insincerity. In doing this, he employs the interesting technique of isolating one particular fact and urging, on the basis of certain authorities, that such is insufficient. This approach does not reflect a true picture of the situation. All factors together must be considered in arriving at a determination of the subjective concept of sincerity. Sincerity is a seamless web; it cannot easily be compartmentalized. For the sake of analysis and rebuttal, however, each of Johnson's contentions will be briefly taken in turn.

A. The timing of an application for discharge may be considered as a relevant factor on sincerity.

Although it is true that some authorities stand for the proposition that timing alone cannot support a finding of insincerity, *Ferrand* v. *Seamans*, 488 F.2d 1386, 1398 (2d Cir. 1973); *Bortree* v. *Resor*, 445 F.2d 776, 784-85 (D.C. Cir. 1971), there is no authority which says that timing cannot be at least considered as a factor. Many cases have allowed such consideration. *Lobis* v. *Secretary of the United States Air Force*, 519 F.2d 304, 307 (1st Cir. 1975); *Dix* v. *Resor*, 449 F.2d 317, 318 (2d Cir. 1971); *Thompson* v. *United States*, *supra* at 327; and *United States ex rel. Checkman* v. *Laird*, *supra* at 786.

In this case, it is true that the Court concluded that the military could reject Johnson's claims because of timing. (A-22, A-24). It is not true, however, that this was the only basis for the rejection. The Court in fact expressly recognized that timing alone was not enough (A-22, A-23). The Court gave due regard to other relevant factors as considered by the military such as the clarity of Johnson's beliefs, his familiarity with the texts that stimulated his philosophical development, and his willingness to perform his duties if his discharge was denied. (A-21) The Court quite properly considered the composite picture.

B. A willingness to perform military duty if C.O. status is denied may be considered as a relevant factor on sincerity.

Without citing any authority, Johnson suggests in his brief that a willingness to perform military duty if denied a conscientious objector discharge may not be considered as relevant on sincerity. Here again, there is no claim that this is an exclusive factor. Moreover, it may well be that an applicant's willingness to perform duty if denied a discharge is a personal attribute not necessarily inconsistent with sincerity of belief. Yet it is equally susceptible to a contrary interpretation in light of the particular facts of an individual case and particularly in light of the Supreme Court's characterization of the conscientious objection exemption as applicable only to "those whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war". *Welsh* v. *United States*, *supra* at 344. (A-21, A-22). In this case, the military has found relevance in this factor as it applies to Johnson. The District Court has concurred in this evaluation. It does not, after all, seem all that unreasonable. For the

Appellate Court to reverse on this ground, it would have to engage in precisely that sort of weighing of the evidence proscribed under the basis in fact test.

C. A finding of legal insincerity is not defeated by certain characterizations of Johnson's demeanor as "sincere".

It is true, as Johnson points in his brief, that a number of interviewers in the administrative process found him to be "sincere". It is clear, however, from a thorough reading of all their comments in context that they were referring primarily to his demeanor. Virtually all of the characterizations of sincerity are followed by qualifying or deprecating remarks on the quality of his conscientious objection. While Lt. Krofft begins by saying "Petty Officer Johnson is sincere in the fact that he personally believes his present beliefs qualify him for conscientious objector status", he goes on to say that Johnson's beliefs are "shallow, poorly formulated, and inconsistent", that his statements are "contradictory" and recommends disapproval. While Chaplain Purdham, on the basis of his interview, found Johnson to be "unquestioningly sincere", he went on to point out that Johnson's "thoughts and decisions lack clarity" pointing out that his favorite expression is "I have so much to learn". Chaplain Purdham also recommended against discharge. (A-77) Chaplain Dolaghan found that Johnson was "sincere, as far as he can see at this time" but noted a certain "skepticism" based "on the fact that he has taken Government pay for 39 months of valuable training and has waited until now to apply as a conscientious objector." (A-76) Cdr. P.H. Farrier's characterization of sincerity was followed by an opinion that Johnson's beliefs had not sufficiently crystalized and that he was having difficulty reconciling his beliefs with the practicalities of daily living (A-75). The medical officer stated that "he does seem quite sincere

but also it is apparent that he is somewhat confused in his ideas. His philosophy (illegible) doesn't make much sense, and for a while I wondered if he had a thought disorder—However on talking about subjects other than his philosophy he is coherent." (A-74) The clinical record consultation sheet dated March 6, 1975 does say that "this individual seems motivated by beliefs of a sincere nature" but when it came to recommendation stated cryptically "no psychiatric contraindication to appropriate administrative action" (A-78). Although Division Officer Roberts noted that Johnson "seems sincere", he added, "I do not feel that his background and past events make him eligible for this C.O. application . . ." (A-66).

Thus, virtually every reference to Johnson as sincere was qualified by some negative statement more directly bearing on conscientious objector eligibility. The fact that the word sincere was used accordingly diminishes in importance. Cases ascribing weight to such characterizations of sincerity have generally included a recommendation for discharge—a factor, conspicuously absent here. *United States ex rel. Tobias* v. *Laird*, 413 F.2d 936 (4th Cir. 1969), *Arlen* v. *Laird*, 345 F. Supp. 181 (S.D.N.Y., 1972). More to the point is the case of *Lovallo* v. *Resor*, 443 F.2d 1262 (2d Cir. 1971) where, on strikingly similar facts the Court found an adequate basis for discharge denial despite characterizations of Lovallo as sincere. The word sincere must not be used in a superficial or one dimensional way. It is possible for a person to have a sincere demeanor without being a sincere conscientious objector. To sincerely believe you are entitled to conscientious objector status is not the equivalent to being entitled to conscientious objector status on the grounds of sincerity. To sincerely want to get out of the military on philosophical grounds is not to be a sincere conscientious objector. If that were the test, every plaintiff would prevail. Sincerity (the third prong in the test for conscientious objector eligibility) must be read in the light of the

other two. One must be opposed to war in any form and this belief must be sincerely and deeply held with the strength of a religious conviction. Sincerity in this sense means more than just being earnest. It has a connotation of seriousness which is inconsistent with shallow, poorly formulated and inconsistent beliefs. One need not be a liar to be found insincere under these criteria; it is sufficient if one's beliefs and opinions are sufficiently disorganized, shallow, inconsistent, and out of tune with one's actions to raise a doubt in a reasonable man that one is serious and genuine in his conscientious objection.

This is quite another thing from imposing a requirement that a conscientious objector's beliefs be formulated with the style of an Augustine or an Acquinas. It is clear that such is not the test. *Kemp* v. *Bradley*, 457 F.2d 627, 629 (8th Cir. 1972); *Helwick* v. *Laird*, 438 F.2d 959, 964 (5th Cir. 1971). The military or the Court can never engage in comparative qualitative analysis of one's religious or philosophical beliefs, granting conscientious objector status only to those who meet some religious test.

But if one's "religion" may not be tested, one's espousal of it may and, in this sense, such factors as lack of depth, and inconsistency of statements and actions may be considered as relevant on sincerity. *Witmer* v. *United States*, *supra*; *Maynard* v. *United States*, 409 F.2d 505 (9th Cir. 1969); *Walsh* v. *United States*, *supra*. *Hunter* v. *United States*, 393 F.2d 548 (9th Cir. 1968); *United States* v. *Coffey*, 429 F.2d 401 (9th Cir. 1970), *cert. denied*, 400 U.S. 993; *United States* v. *Stewart*, 472 F.2d 1114 (1st Cir. 1973); *Rosengart* v. *Laird*, *supra* at 529-530; *United States* v. *Tigerman*, 456 F.2d 54, 56 (9th Cir. 1972); *United States* v. *Jones*, 456 F.2d 627, 629 (3d Cir. 1972), and *DeWalt* v. *Commanding Officer*, 476 F.2d 440, 442 (5th Cir. 1973). The Court in *Coffey*, *supra*, at 405 put it that the board could have found that a statement of beliefs was insincere in two ways:

> *First*, it might have determined that Coffey did not in fact believe what he said he did . . .
>
> *Second*, the board might have determined that though Coffey in fact believed what he said he did, his belief was not 'deeply held' within the meaning of *Welsh, supra, i.e.*, that despite his beliefs he *could* bring himself to kill in war, or that the penalty for violating his beliefs would have been only a few pinpricks of conscience as opposed to the stern remorse which the *Welch* test requires.

It is evident that Johnson was found to be insincere in this latter sense. This pervades the denial letter of January 22, 1976 (A-102, A-103) as well as the opinion of Judge Zampano (A-16, A-25). The evidence was rightly found to be more than sufficient under the basis in fact test.

V.

CONCLUSION

This is an area of the law where semantics are important and it is easy to play games with words. The same word can be used in different senses. The same facts may be adduced in support of different theories, and those facts lend themselves to differing interpretations especially when considered in isolation and not as part of a composite whole. Cases can be cited in support of many apparently conflicting propositions. Perhaps a reason for this rather nebulous quality is that factual considerations so strongly influence legal ones. But as John Locke said in his *Essay on Human Understanding*, "We should have a great many fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for things themselves".

The bottom line of analysis must rest on the upholding of the integrity of the relationship between the Court and the administrative body in light of the basis in fact test. It matters not what the Court's independent analysis of the evidence might be. It only matters that an appellate Court must reverse if an administrative body has gone so far as to have made a decision without any basis in fact. Any intervention prior to that rather high threshold would be substituting judicial for administrative decisionmaking. Yet this is precisely what appellant Johnson is seeking. Having failed to convince anyone who interviewed him, having failed to convince the decisionmakers at any stage of the administrative process, and having failed to convince a District Court Judge, he now comes to this Court hoping essentially to retry his case. This is not his right. And it is respectfully submitted that this Court should uphold the integrity of the administrative process by so finding.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-2057

GREGORY A. JOHNSON,
Appellant

v.

COMMANDING OFFICER, USS CASIMIR PULASKI (SSBN 633)
BLUE CREW UNITED STATES NAVY, GROTON, CONNECTICUT
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, N.Y.

That on the 29th day of October, 1976, deponent served the within Brief for the Appellee upon M. Mitchell Morse, Esq., Jacobs, Jacobs & Grudberg 207 Orange Street, New Haven, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Stephen Zedalis

This 29th day of October 1976

IRVING YEDWAB
Notary Public, State of New York
No. 24-4362415
Qualified in Kings County
Commission Expires March 30, 1977